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ABSTRACT

Fresh light might be shed on problems of federal education policy by treating them not only as problems of intergovernmental relations but of government regulation of enterprise, given that they involve the attempts of a central government to influence the conduct of enterprises that it does not own nor directly operate. Using well-established categories of regulatory analysis, it appears that certain traditional justifications for regulation, such as correcting for spillover effects, compensating for inadequate consumer information, and reducing "moral hazzard" and paternalism, do apply to federal school regulation. It also appears that traditional regulatory tools such as cost of service rate-making, licensing, disclosure requirements, and standard-setting enjoy roughly the same advantages and disadvantages in education as in other areas. It is concluded that regulatory analysis of education policy points the way toward greater concern for price competition and the survival of innovation under regulatory regimes and toward a reexamination of public ownership of schools. (Author/IRT)

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FEDERAL REGULATION OF EDUCATION

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Abstract

Fresh light might be shed on problems of federal education policy by treating them not only as problems of intergovernmental relations but of government regulation of enterprise, given that they involve the attempts of a central government to influence the conduct of enterprises that it does not own nor directly operate. Using well-established categories of regulatory analysis, it appears that certain traditional justifications for regulation such as correcting for spillover effects, compensating for inadequate consumer information, reducing "moral hazard" and paternalism do apply to federal school regulation. It also appears that traditional regulatory tools such as cost of service rate-making, licensing, disclosure requirements and standard setting enjoy roughly the same advantages and disadvantages in education as in other areas. It is concluded that regulatory analysis of education policy points the way toward greater concern for price competition and the survival of innovation under regulatory regimes and toward a reexamanation of public ownership of schools.

For sound historical reasons education policy in the United States has normally been treated as essentially a matter of intergovernmental relations. Schools are operated by local governments. In varying degrees in the various states, state governments have taken over some of the financing and control of those schools. This process has been seen as one involving classic questions of administrative centralization and decentralization. As our third tier of government, the national government, has entered the picture, even more complex problems of intergovernmental relations arise. For now the whole, complex theory and practice of federalism must be invoked. Added to questions of centralization, which are basically questions of administrative efficiency, are added constitutional questions of the proper spheres of state and federal government. 1/

For many observers, however, all of these questions of the areal division of powers 2/ are fundamentally uninteresting because their answers are predetermined -- predetermined by the long-term American movement toward centralization and national uniformity that characterizes all industrialized states. For others of course this very tendency raises fundamental issues of democratic theory. Can the citizenry meaningfully participate in massive, distant, centralized government? Is local control of schools the

last crumbling bastion of grass roots democracy? For others yet these questions too are uninteresting. The dominant value of democracy is equality. Equality will be served by national domination over diverse and, therefore, necessarily unequal state and local units. The only real problem for such persons is implementation, just what level of national government coercion of local governments will be optimal in achieving national equality. 3/

Thus the essential concerns in the education debate have become concerns of public administration, bureaucratic politics and the legal relations between various levels of government. 4/ Without for a moment questioning the validity of this intergovernmental frame of reference, I wish to suggest that some fresh light might be shed on problems of education policy by viewing the area not as one of intergovernmental relations but as one of government regulation of private enterprise.

The analogy of regulation suggests itself because of the primary features of regulation. Under regulatory regimes, ownership, primary control and day-to-day decision making remain in the hands of one set of persons pursuing their own self-determined set of purposes. The government regulator seeks to achieve the public's purposes not by taking direct control of what is done but by specifying a number of things that shall not be done. Regulation is

essentially negative and reactive to the positive initiatives of others. So regulation is awkward because correcting people each time they do something wrong is not the simplest and most direct way of getting them to do right. For this reason, over time regulators tends to mix more and more positive commands into their essentially negative regime.

The relation of the national government to public schooling in the United States exhibits these characteristics. That the schools are public rather than private enterprises may cause us ultimately to severely modify the regulatory model. At least initially, however, we might say that the fact that their ownership, primary control and day-to-day decision making are in the hands of a large number of small sets of persons who do not belong to the government body seeking to control them is more important than the fact that these sets of persons constitute legally public rather than private enterprises.

Local districts, run by full-time professional administrators and theoretically responsible to the local voters, are in many ways comparable to corporations run by full-time professional executives and theoretically responsible to their shareholders. The same kind of gap between control and ownership exists in both instances. If we were sure that the executives of private corporations were driven

primarily by profit maximization motives, that might considerably cramp the analogy. It would appear, however, that corporate executives are subject to a web of motives ranging from self aggrandizement to the need for tranquility that is not far different from that of public administrators. Here, as in traditional regulation, the national agency seeks to get the "industry" to do what it wants it to do by a series of regulatory carrots and sticks rather than by direct control. And the principal agency involved, the Department of Education, is a single industry regulator with the same ambivalent charge given to most single industry regulators. It must both serve the public or consumer interest and protect the health of the industry. 5/ It would appear then that some parts of the rather extensive body of analysis developed to deal with regulation, deregulation and regulatory reform might be applicable to federal regulation of the education industry.

Before attempting this exercise, however, I want to make clear that it is by no means value or policy neutral. The ghost at the feast -- the spectre that keeps arising in this seminar and in the realm of education policy more generally -- is government coercion. When we assert the constitutional right of X to school integration, we are asserting that the government may legitimately coerce Y to any extent necessary, up to and including killing him, in

order to achieve the right of X. Paul Berman's paper [6] boils down to the following advice. When a policy is "easy," coerce to the maximum. When a policy is "hard," coerce to the minimum. Berman's prescription rests on essentially libertarian premises. If one is more concerned with results than liberty, one might arrive at the opposite prescription. The less sure you are a policy will work and the more resistance you anticipate, the more coercion you should use. An easy policy will win its own way. A hard policy must be forced down people's throats if it is to have any chance of actually winning.

Tom Pettigrew's dismay over the relations between lawyers and social scientists and disdain for certain legal terms and doctrines also arises from the coercion problem. Thus from the social scientist's persepctive, Richmond, with its core of blacks, its inner ring of whites and its outer ring blacks, may be the perfect setting for "metro" integration schemes. But what the social scientist is saying is: If they fight we will crush them with the police and the army, and if they run, we've got a black wall to stop them. The social science witnesses in desegregation proceedings are concentrating on social measures and instruments to achieve stated goals. They assume coercion -- as well they might since they are neither experts at coercion nor the initiators of that coercion. It is precisely be-

cause the lawyers are the expert at and responsible for the coercion that they worry about such meaningless doctrines as de facto and de jure. For those doctrines determine just how many children we draft for the integration war and bus off to the battlefield. Social scientists dealing with desegregation assume -- rightly -- that our commitment to whatever level of coercion is necessary to achieve desegregation has already been made when we constitutionalized the right to desegregation. Their job is to specify what social rearrangements are necessary to achieve desegregation. It is somebody else's job to determine how much coercion will be needed to implement those rearrangements and to wield that coercion.

Quite apart from desegregation, one of the themes running through this seminar is equality. Where law and education is the topic and equality is a goal or value, coercion lurks. Ultimately many of us are asking, how much shall we use the law, that is the coercion of some, to achieve equality for others. Traditionally Americans have partially defused the coercion inherent in public education through local control and deliberate choice of school district by choice of residence. Increasingly many of us resent this exercise of freedom and seek to coerce such persons into toeing the egalitarian mark.

It is important to put this issue of coercion in plain sight in this paper because an analysis of federal education policy in regulatory terms immediately implicates a stance toward coercion and toward equality. Most contemporary regulatory analysis is neo-classical. It starts from the premise that, all other things being equal, persons ought to have what they prefer. Government ought to interfere with private choices in free markets as little as possible. While neo-classicism is customarily dressed in the language of economic efficiency, its basic value stance is really a preference for freedom over equality. The fact that individuals vary widely in their capacity to choose because they vary widely in income is washed over by fascination with the capacity for free choice that the market place brings Thus in treating education as a problem in regulation and deregulation, I am consciously choosing to assert that freedom is to be preferred to coercion even in circumstances where people with more money are freer than people with less money. Of course the customary savings clause of the neo-classicists may be added. If greater equality is desired, it should be achieved by an incomes policy rather than by reducing individual choice.

In adopting a regulatory framework, however, we are not necessarily adopting the view that economic efficiency is the sole criterion of education policy. It has always

been permissible for regulators to deviate from optimal efficiency where some other legitimate purpose of government was served by doing so. Indeed in many instances we regulate precisely because we are not willing to accept the state of the world that economic efficiency would dictate. Nevertheless when we speak of regulation of any service, including education, we have in mind that whatever level and distribution of the service is specified ought to be provided at least cost and that, if the level and distribution of services provided varies greatly from consumer preferences, some special rationale for that variation must be offered.

All of us are familiar with the rather extreme argument that there are no inherently governmental services -- that even fire and police services could be provided by private enterprise in a free market. There is no need to go to that extreme here. Historically in the United States there has been a great deal of non-governmental education and in at least a few areas of the country real choices between schools have been available to some consumers. 8/ Moreover, in a growing and highly physically mobile society, public school systems have competed with each other, the consumer choosing his school by choosing his place of residence. It would be difficult to argue that education is purely a governmental enterprise that it would be meaning-

less to apply a regulatory as opposed to a pure governmental or bureaucratic analysis.

As a tentative experiment in the adoption of regulatory analysis, I propose here to run through Stephen Breyer's recent outline of regulation, [9] indicating what portions appear to be applicable to education and then attempting some suggestions about what insights the applicable portions might bring.

Breyer begins with justifications for regulation -- or in our case the justifications for federal regulation of local schools. [10] His first justification is control of natural monopoly. In rural areas with thinly-spread populations, it might be argued that education is a natural monopoly. There appear to be certain economies of scale that rise steeply at secondary school levels. The school consolidation movement and the popularity of the "unified" school district are evidence of these tendencies to natural monopoly. In urban areas, however, economies of scale can be achieved without anything approaching natural monopoly or even oligopoly. It would appear then that, from this perspective, there is increasingly less justification for regulation as the American population becomes more concentrated.

We may wish to substitute some notion of historical monopoly for natural monopoly here. In large parts of the

country and for major classes of consumers, public schooling has been seen as the sole alternative for a hundred years or more. Such ingrained consumer habits may appear to economists to present only cost of entry problems; that is, they may be overcome by spending enough on initial advertising and distribution to overcome the old product's grip on the market. Thus historical monopoly may not be comparable to natural monopoly situations in which two firms simply could not perform efficiently after the second had broken into the market.

Perhaps the answer is that public schools enjoy not only a historical quasi-monopoly but a legal quasi-monopoly. They are akin to public utilities not because two or more systems could not efficiently operate in the same area, but because the law gives decisive advantages to one system over its potential rivals. Public financing of public schools creates a legal quasi-monopoly in education because it is extremely difficult for schools that must charge tuition to compete with those that don't. Thus government regulation might make sense under the monopoly rationale <u>if</u> the local government enterpreneurs who own and operate the local monopolies can be seen as having interests contrary to the public interest. For otherwise we would have to say that the public utility or legal monopoly problem had already been solved by an alternative to regulation -- public

ownership.

Breyer's second justification, control of windfall profits, [11] does not seem applicable to education. His third, "correcting for spillovers" does. [12] The spill-over problem exists when a commodity is priced too low because the producer does not bear some of the costs that its production imposes on the economy. As Breyer notes, if one of the costs of production of steel is air pollution, then regulation may be aimed at forcing producers to install scrubbers and add the cost of the scrubbers to the price of the steel so that the pollution costs fall on steel consumers rather than upon those who live near steel mills.

In fact a great deal of federal regulation is now aimed at loading spill-over costs on the education industry. We are wont to trace all sorts of social evils to inadequate or segregated or insensitive schooling and insist that schools install desegregation and handicapped programs and so on and pass the costs on to those who pay for education. The special difficulty that arises is that a great many social costs that cannot be attributed to the operation of the education industry are none the less treated as if they were spillovers. Teen-age pregnancy cannot fairly be attributed to the operation of the industry. Nonetheless, we seek, by regulation, to load part of the cost of teen-age pregnancy on the schools in the form of mandated sex educa-

tion programs. The education industry is peculiarly subject to these false attributions of spillover costs. Steel manufacture can only be implicated in a limited range of social costs. It is easy and customary to implicate education in a very wide range of social costs and so to run up the imposed costs of education far beyond any direct observable benefit to the educational consumer.

Breyer then notes that "Government regulation is sometimes designed to correct for inadequate consumer information ...." [13/] Strangely enough this has not been a particularly active field of government regulation of schools, presumably because publicly elected school boards, PTA's and direct word of mouth information passed from child to parent have provided substantial consumer information. Yet this area of regulation is now growing, at least at the state level. More and more states require the schools to submit to statewide or national testing of their pupils and the publication of the test scores. The result clearly is more consumer demands on the industry. In addition various government mandated education programs may have information components. For instance, in some states sex education statutes require that parents be informed of the content of the courses.

Breyer describes hsi next regulation rationale -- excessive competion -- as an "empty box" and in any event it does not seem readily applicable to education. [14/]

His next category, however, "moral hazard" may be central to education in the future. [15] The moral hazard problem typically arises in the context of government action. Breyer says, "The term 'moral hazard' is used to describe a situation in which someone other than a buyer pays for the buyer's purchases. The buyer feels no pocketbook constraint, and will purchase a good oblivious to the resource costs he imposes upon the economy." Breyer offers the example of government and insurer payment for medical care. Because individual consumers do not pay, they overstate their demand. One response is to regulate the prices of medical services and the supply of hospital facilities.

A major example of the moral hazard problem arises out of the recent education for the handicapped legislation. [16] The parents of handicapped children are now legally entitled to demand a vast array of "free" educational facilities and services for their children. It does not take a crystal ball to predict that the costs of the services demanded will far exceed the benefits to society and that, unless some kind of regulation is done, costs to government will reach bizarre levels. At first the inertia of school organizations and the initial unfamiliarity of parents with the scope of their statutory rights will hold down costs. After this initial sluggishness is overcome by vigorous federal government implementation, the race will be on to equal

education for all no matter what the cost. In the last few years most government action has been in the direction of creating more moral hazard. Eventually cost controlling regulation will follow.

Breyer's final major rationale for regulation is "rationalization." [17] Sometimes an industry appears to consist of too many firms, each of too small size, to achieve economies of scale. At the state level, the school consolidation movement has been such a rationalization. [18] If we are willing to include other governmental purposes than achieving economies of scale, then metro desegregation remedies are rationalizing regulations.

Breyer offers a closing set of "minor" justifications among which one is major in the realm of education -- paternalism. [19] Most state and federal regulation of local school authorities rests on the firm conviction that the state and federal authorities know better than the local authorities what is good for the children and society. Federal regulation of schools rests firmly in the belief of the liberal policy-making elite that intellectuals, social scientists, educationists and judges know what is good for the schools and locally-elected school boards, dominated as they are by bad, white, middle-class Babbits, do not.

For many this position will provide a quite persuasive

reason for rejecting a regulatory analysis approach to education. For, as I was careful to point out initially, regulatory analysis ultimately rests on the belief that the individual is the best judge of his own wants. If that belief is something of a fiction even for the individual vis-a-vis government, how much more so for one government unit is ultimately wiser than a central one, particular in the light of a long record of local malfeasance -- at least malfeasance in regard to the various underdogs we so cherish. If we trusted local school boards, then a straight "incomes" policy would assure equality and federal regulation could wither away even for those principally concerned with equality. A federal grant in aid system to equalize the financial resources of the districts would be sufficient. In reality, however, paternalism may so overdetermine our quest for federal regulation, that all other rationales become trivial. If this is true, however, it would be well to recognize it. And so it seems worthwhile to work through the other rationales and the regulatory techniques that typically accompany them to discover whether federal education regulation can rest on any other basis than the assertion that Washington knows best.

Returning then to our rationales for regulation, we may now fit them with appropriate regulatory weapons. We noted that public schools enjoyed a legal quasi-monopoly or

public utility status. We also noted that in a sense the most extreme regulatory device, public ownership and control, has already been employed to deal with that problem. The popularity of federal regulation indicates that even that level of regulation appears to some to be insufficient to protect the public interest, apparently because local owners did not reflect the national public interest -- or at least somebody's version of it. Traditionally, as Breyer points out, the response to natural or legal monopoly has been cost of service rate making. 20/ The operating firm is allowed to set a price which recovers its costs plus a fixed percentage of those costs as profit. The principal objections to this technique are that it prices above what the market price would be and that it drives competing quasi-monopolists to compete in services rather than prices. Thus, before airline deregulation, it is alleged that we all had to pay high ticket prices we didn't want and receive fancy meals and other frills we also didn't want because carriers, all of whom had to charge the same price, competed in giving extra services.

While the cost of service technique and its problems are not directly relevant to education, they do provide some instructive lessons. In a sense we use cost of service rate setting now, but it is the tax rate we set. We set it at whatever the costs of the schools are, not at the market value

of their services. Critics of cost of service techniques argue that they lead to general incentives against cost savings in the industry and particularly to the inflation of administrative overhead. Certainly schools have often been accused of precisely these phenomena. Thus those plans designed to introduce "competition" in the education industry which use cost of service rate setting are in a certain sense suspect. Voucher plans that peg payments to some fixed percentage of public school per pupil expenditure will tend to perpetuate whatever inefficiencies now exist in public school operation and to lose most of the economic advantage of competition.

Of course it may be replied that the goal of voucher plans is precisely that of creating the situation in the airline industry before deregulation. If there are a number of alternative education lines, all compelled to charge the same rate, like the airlines they may compete in the offering of services.

Such a sitution will appear attractive to those who are not concerned with the high cost of schooling but are concerned with what appears to them to be the low level of educational services currently provided by the public schools. For reasons that will become clearer when we examine standard setting as a regulatory technique, regulation is a peculiarly weak method of fostering innovation. The creation

of a climate peculiarly favorable to innovation may be the silver lining of cost of service rate regulation that encourages service as a substitute for price competition.

Precisely because it escapes the price system, however, service competition is replete with its own special dangers. First and foremost of course is the danger that unwanted services may be thrust on the consumer who would actually prefer lower prices. Once those services have been routinized, their costs will become part of the "rate base" so that rates will further spiral, giving people more and more services they do not want at higher and higher prices. Second, as the airline example suggests, service competitors will choose those additional services that are easiest for the consumers to perceive as extras. A choice of chicken or steak may be far more readily observable than a two-minute cut in average time of baggage delivery. It is certainly far more observable than a slight improvement in engine maintenance. Might we expect schools too to provide a class in Greek or wholistic medicine rather than devoting a little more time to the correcting of each student paper. Thirdly, voucher advocates have hoped for variety of services. Yet service competitors may crowd together toward the mass of consumers rather than disperse to service distinct market segments. There might well be an educational equivalent of the half dozen six o'clock flights from New York to Los

Angeles.

Ultimately the attraction of service competition in education depends upon guesses about consumer and producer capabilities and values. Effective price competition requires only a moderately effective consumer, for prices themselves provide a great deal of easily understood and immediately salient information. Service competition requires much more sophisticated and attentive consumers. It is not clear that even the parents of school-age children are such consumers. If we want service competition because we want educational innovation, then we must have some faith that the competitors will choose to compete in truly innovative services rather than "frills." What basis do we have for that faith?

Finally cost of services rate setting plus service competition plus public payment of the rate create moral hazard problems of gigantic proportions. Because the consumer is not paying for the service provided and the schools are competing to provide more and more such services, costs will spiral unless services are rationed in some way. One method of rationing would be to substitute another regulatory technique for cost of service ratemaking. Breyer notes that "When the government seeks to control the prices of large numbers of firms with disparate costs ... the only practical method is an historically-based system." Thus voucher pay-

ments could be pegged to the historical public school rates. Breyer, and everyone else, also note, however, that over the medium and long term such price controls become more and more difficult to operate successfully.

Another rationing method would be to rely on local political processes to regulate the school tax rate and thus set a ceiling on total cost of education services. Given that the whole movement toward central government regulation of education is based on distrust of local political processes, it is unlikely that the regulators could resist making better choices than the local districts. In the short run local and state political processes would constrain total allocation to education, but precisely because the only defensible basis for setting any particular ceiling is historical cost of services, this constraint would break down over time.

The most probable outcome of voucher systems, therefore, would be elaborate central government regulation of just what services each school could offer comparable to the regulations now being evolved for hospitals in attempts to cut back on their service competition plus moral hazard problems. Thus paradoxically, in the long haul, voucher plans would result in more centralized control of curricula than currently exists.

This predicted fate for voucher systems reminds us

that education policy constantly flirts with another regulatory weapon, allocation of licenses under a "public interest" standard. [21] Vouchers might inpsire a great push toward such licensing because the possible proliferation of very small schools would raise economy of scale and "over competition" problems (which might well be spurious but none the less serve as a persuasive argument for political forces that wanted licensing for essentially restrictive purposes). The school consolidation movement has already given us one such public interest licensing scheme. School desegregation schemes are now giving us others as judges license "magnet" schools and allocate particular educational services among competing schools in the same district. Without attempting a full analysis, perhaps it is enough to say here that in the transportation and communications areas in which it has been most employed, licensing has not proven to be an unqualified success. It seems unlikely that we will do a lot better at deciding who is best qualified to run a school where than we have been at deciding who is best qualified to run a TV station or an airline where.

Breyer notes three other regulatory techniques of obvious relevance to education. One is individualized screening, principally occupational licensing. [22] Teaching was one of the earliest licensed occupations. We know that ultimately a device designed to keep the incompetent

out has been one of the factors combining to keep the incompetent in and to attract them in the first place. Here we have already experienced a partial deregulation movement as many states reduced the numbers of education courses required of those seeking credentials. Affirmative action considerations have probably inspired a further round of sub rosa deregulation. As the competition for teaching jobs increases, however, we can expect calls for re-regulation; for higher standards, more special courses, etc. This is a natural supply limiting response of any "profession." Affirmative action concerns may limit this pressure since any real upgrading of standards probably would have a disproportionate racial impact. Quantity has been the traditional substitute for quality in education, and minorities could no doubt sit through more education courses just as successfully as non-minorities. Thus we can expect a new outbreak of enthusiasm for regulation of this type.

Breyer lists disclosure requirements as both a regulatory technique and an alternative to classical regulatory regimes. 23/ He notes the problems of standards setting posed by disclosure but in general sees disclosure as preferable to classical regulation because it leaves the producer greater flexibility in deciding what to produce and what to charge.

Breyer's rather sanguine discussion of disclosure is based, I believe, on excessive concentration on disclosure

in product as opposed to personal service areas. We are currently moving through a great wave of disclosure regulations in personal service areas under slogans ranging from due process to informed consent. The requirements of individualized plans and parental consultation instituted in education for the handicapped [24] and flirted with in poverty education [25] are major incursions of disclosure regulation into education. So are the various statutory guarantees of student access to their files. [26] And so are basic due process requirements imposed on school disciplinary actions. [27] Perhaps most important are the growing number of state requirements for state-wide uniform testing and the publication of test scores by school or district. Nationwide comparative scoring is already a reality although not mandated by statute.

Problems generated by disclosure requirements daily are becoming more evident. Breyer notes the cognative problems that may arise in any disclosure situation. Consumers simply may not understand. In personal service areas affective problems may be just as important. It remains to be seen for instance whether full disclosure to the parents of mentally handicapped children will, even on average, enhance their lives and their children's education. The emotional impact of disclosure in personal service areas is a subject requiring more research.

Aside from this range of problems there is the more familiar problem of production distortions caused by partial disclosure requirements. If gas mileage must be disclosed, but repair costs need not be, then cars which lose more in repairs than they save in gas may be produced. Teaching to the tests is a familiar cry in education.

The opposite side of this coin is, of course, that selective disclosure requirements may be manipulated by the regulator to achieve the desired production decisions. Particularly when we are faced by entrenched professional elites, selective testing and disclosure may force production intc modes that some omnicient "we" want. If we want the children to be able to spell and punctuate, and the teachers want them to be creative, then we may be able to force the teachers to teach spelling and punctuation by the tests we write. Of course all this depends on finding some way of punishing the teachers if the children do badly on the tests.

This aspect of disclosure as a regulatory weapon leads directly into the last of the regulatory techniques itemized by Breyer, that of standard setting. [28/] The imposition of legal standards on an industry raises a number of major problems that Breyer groups under four headings; information, enforcement, competition and judicial review. The thrust

of his message about information is that the major problem endemic to standards setting is that collectively we don't know what we want and tachnologically we don't know how to get it. The regulator's sources of information are limited and the industry tends to supply distorted information. To build up an independent source of information in the agency comparable to that of the industry would require building a mini industry within the agency itself. Outside experts may not have the detailed up-to-date data necessary to real expertise. And most importantly, no one may know enough to be sure they are setting correct standards particularly in an industry where technology is uncertain or rapidly developing. As a result political debate sets the agenda for standards setting, defining what problems the standard setters should address and the particular causal elements they should seek to control. And the actual content of the standards will be determined by political negotiations among the contending parties.

Certainly Breyer's analysis has a familiar ring particularly in regard to the saga of Title I of the Elementary and Secondary Schools Act. The basic assumption that more and better education would increase the social mobility of the poor was a politically-motivated statement of the agenda. The great masses of data embedded in the industry were difficult for the regulators to tap and their build up of

inside expertise and outside expert consultation were time consuming and incomplete. The end result was to attempt to build a mini industry within the regulatory agency -- the National Institute of Education. Of course the Institute is not a mini industry in the literal sense of operating a school system but it seeks to create a surrogate for such expertise through systematically marshalling research efforts and results. 29/ Above all standards setting under Title I has been plagued by the problem that, at the technological level, we simply do not know enough to set standards defining optimal educational practice. Absent this knowledge, we cannot really even decide what we want, because there is no use wanting something we can't get. In brief we don't know how to educate poor children to the level of their middle-class counterparts. And we don't know whether so educating them would end their poverty. 30/ So we don't even know whether we want to educate poor children to the level of their middle-class counterparts. Yet standards under Title I are formulated as if we did.

Nevertheless it must be said that standard setting under Title I has been responsive to this type of regulatory analysis. The standard setters have wisely avoided setting standards for actual teaching practice because they really had no idea what practices would work. 31/ The refusal to develop standards defining a national, uniform set of cur-

ricula and teaching practices has been smart regulation. Instead standards setting has occurred largely in the area where we do know a little something -- that of accounting. Most standards under Title I have not really been directed to education at all but to insuring that federal money was used for additional spending on poor children rather than spent on the rich or used to reduce state and local tax burdens by substituting federal dollars for those of local tax payers. 32/ We do know enough about school financing and accounting to write modestly successful standards of this sort. While we will look at enforcement of these standards shortly, at least it can be said that standards were set in the areas we know most about and shunned in those we know least about.

In the process of goal displacement familiar to all students of incremental decision making, the administrators of Title I no longer purport to be increasing the social mobility of the poor through education, or even improving the educational achievements of the poor. Instead the means -- spending money -- has become the goal. 33/ The purpose of Title I is to spend federal money on the education of the poor and its rationale is simply that our dedication to the value of equality demands that school expenditures on poor and middle-class children should be equalized. We do have federal education standards appropriate to that

goal.

Breyer's second major problem of standard setting is enforcement. 34/ He notes that the need for enforcement will "bias the standards toward enforceability rather than achieving the ends sought," and so will move us toward design rather than performance standards. Design standards in turn reduce innovation. And the smaller the agency's resources, "the more the agency must rely upon voluntary compliance for enforcement -- which biases choice further in the direction of simply standards which the industry finds reasonable." 35/

Certainly this summary is rather neatly applicable to our Title I experience. While some observers purport to see a marked improvement of Title I enforcement during the last five years, 36/ there is certainly unanimity on the finding that, during the first ten years of the program, implementation was very, very faulty. 37/ Most school districts poured the federal money in at one end and education out at the other but so intermixed federal and local funds along the way that they managed to avoid spending the federal funds to supplement education for the poor. Instead the federal funds were turned into an unchanneled stream of extra money and used by the local districts for tax relief or as a general supplement to their whole programs -- programs which tended to favor middle class

children. 38/

In response there was a movement to design as opposed to performance standards. The federal bureaucracy could not really demand that the testable performance of poor children be improved because no one know whether spending money could reasonably be expected to achieve such an improvement. Instead standards were developed to assure that the federal money was really spent on the poor and was really spent over and above what the localities had been spending on the poor before. 39/ These financial design standards, however, do not necessarily inhibit innovation in actual teaching techniques. So although they may not be as good as performance standards they may not be as bad as design standards are usually thought to be. They may, however, lead to a disproportionate allocation of local management resources to bookkeeping, rather than school teaching. And some incidental constraints on teaching innovation probably occur particularly in class rooms that mix eligible and non-eligible students where teachers must make sure that the wrong children to not benefit from educational improvements achieved with Title I money.

Breyer's third category of standards problems relates to reducing competition in the regulated market. 40/ For our purposes we might translate competition to innovation. Standards are likely to freeze industry practice. While Title I administrators have partially avoided this problem,

it is obviously enormous in the desegregation area. HEW standards in this area have frequently reduced the ability of local districts to mount new programs of many sorts because certain kinds of classes may attract disproportionate shares of white or minority students or boys or girls. 41/

There is going to be strong temptations to move toward very extensive standard setting in the area of educating the handicapped. The demand for individuated educational plans for each handicapped student is an idle dream. If there is going to be federal monitoring, as there certainly is going to be, the federal bureaucrats are going to want regulations that routinize their surveillance and state and local authorities are going to want standards that will allow them to anticipate federal reaction. Here we have the typical breeding ground for the proliferation of rigid, design standards that hinder innovation and vest enormous power in the status quo professionals who build up tremendous expertise in existing regulations.

Breyer's fourth problem type is that of judicial review. 42/ Standards must survive review and that leads to enormous agency expenditure of time and effort, reduced flexibility and a lot of meddling by judges who don't know what they're doing. The theme of judicial review is being played often enough in this seminar that I will not offer the variations here.

Having looked at the various modes of regulations and the problems that accompany them, we might attempt to read some prudential lessons for the world of education. Those lessons lie, I believe, in two major areas. The first is costs. The second is innovation.

It is rather striking that almost no one writing and thinking about education is talking about cutting costs. The tacit assumption, and more often the professed goal, of the education community is either maintaining or increasing the levels of federal expenditure. We, and the we includes most of the voucher people, have accepted cost of service rate making in education. No one will talk about price rather than service competition. Yet the inefficiency potential of cost of service plus the moral hazard potential of such new programs as that in education for the handicapped cry out for a re-examination of price mechanism. Perhaps that is what the tax payers have been telling us none too gently in the last couple of years. Is it absolutely insane to talk about contracting out under competitive bidding as an alternate economic regime for education? Is it possible, short of such a regime, to build some price competition into the regime of federal fund distribution in education.

When we turn to innovation the lessons are, I believe, fairly clear. We do not know enough about education to

set standards. Indeed we do not know enough about education to do much regulation of any kind. We do not even know enough to spend money intelligently. If we wish to take the Title I tack and say our sense of fairness and our commitment to equality demand that we equalize the number of dollars we dump on poor and rich student heads, so be it, but that has nothing to do with regulatory policy in education. If we take the Title VI tack and say, you must pay attention to the handicapped, we are doing a piece of political agenda setting that we may wish to do, but no one ought to pretend that we are engaging in rational regulatory policy. Given the capacity of regulation to stifle innovation and the need for innovation in education, the best regulatory tactic in terms of innovation is probably to spend federal money but avoid federal regulation. If it seems unlikely that the political process is going to let us have our cake and eat it too in this way, is it too much to suggest that more federal money will be detrimental to education because it will bring more innovation stifling regulation in its train?

This very preliminary and tentative survey of regulation suggests that what Breyer labels "paternalism" is at the heart of most central government regulation of education. We have noted that at the local level Americans initially opted for the most extreme form of governmental

control, public ownership. Presumably they did so because they believed that local voting majorities knew better than local, individual parents what would be best educationally for the children of the community. That form of paternalism is now under attack from the voucher forces. As we see that federal regulation is probably not well suited to cure market failures and facilitate individual consumer choice, we may well conclude that what we are really observing in federal regulation is a half way house on the road toward basic governance of the schools by the central government. If so a regulatory analysis will serve as a useful brush clearing operation that will lead us back to two major points: (1) is any form of government ownership best for education and (2) if government ownership has failed at the local level, why do we think it will succeed at the national level? The response of some will be that in a democracy majorities, not individual parents, should decide what education should be and that we prefer the values of national majorities to those of local majorities. If this response is satisfactory, then either we must demonstrate that nationalization a la the French example will work or that regulatory techniques which have not worked terribly well to facilitate consumer preferences, can be made to work better to facilitate majority preferences.

FOOTNOTES

1. See Shapiro, "American Federalism" in R. Collins, Constitutional Government in America (1980)

2. A. Maass, ed., Area and Power: A Theory of Local Government (1959)

3. While "implementation" studies rarely openly espouse this view, it is the underlying assumption of many of them. See J. Jeffrey, Education for Children of the Poor: A Study of the Origins and Implementation of the Elementary and Secondary Education Act of 1964 (1974)

4. See, e.g., F. Wirt and W. Kirst, The Political Web of American Schools (1972); A. Laparti, Education and the Federal Government (1975); T. Pierce, Federal, State and Local Government in Education (1964); R. Morlan, Intergovernmental Relations in Education (1950); J. Berke and M. Kirst, eds., Federal Aid to Education (1972)

5. On the distinction between single industry and multi-industry regulation see M. Weidenbaum, Business, Government and the Public (1978)

6. Berman, "Thinking About Programmed and Adaptive Implementation: Matching Strategies to Situations"

7. T. Pettigrew, Comments during the seminar

8. See R. Butts and L. Cremins, A History of Education in American Culture (1953); R. McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870-1945 (1946); H. Good and J. Teller, A History of American Education (1973)

9. S. Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform," 92 Harvard Law Review 549 (1979) [hereafter Breyer]

10. Breyer 553

11. Breyer 554

12. Breyer 555

13. Breyer 556

14. Breyer 556

15. Breyer 557

16. See A. Abeson and J. Zettel, "End of the Quiet Revolution: The Education for All Handicapped Children Act of 1975," 44 Exceptional Children 145 (1975); N. Kreinberg and S. Chow, Configuration of Change: The Integration of Mildly Handicapped Children into the Regular Classroom (1973); J. Baugh, "Federal Legislation on Equal Educational Opportunities for the Handicapped," 15 Idaho L.R. 65 (1978); "Comment: Enforcing the Right to an 'Appropriate' Education: The Education For All Handicapped Children Act of 1975, 92 Harv. L.R. 1103 (1979); J. Simons and B. Dwyer, "Education of the Handicapped," 33 Annals #2 99 (1978)

17. Breyer 558

18. See J. Sher and R. Tompkins, Economy Efficiency and Equality: The Myths of Rural School and District Consolidation (1976)

19. Breyer 559

20. Breyer 562

21. Breyer 566

22. Breyer 575

23. Breyer 579

24. See "Comment," op. cit. supra note 16

25. not used

26. See "Comment: Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Education Rights and Privacy Acts of 1974," 61 Indiana Law Review 74 (1975)

27. See D. Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting," 28 Stan. L.R. 841 (1976)

27B. Van Giel, op. cit. supra note 31, p. 85

28. Breyer 570

29. N.I.E.: Its History and Programs (Office of Public Information (1974)

30. See J. Jeffrey, op. cit. supra note 3, pp. 3-26

31. See S. Bailey and E. Mosher, Elementary and Secondary Education Act: The Office of Education Administers a Law (1968); Jeffrey, op. cit supra note 3; T. Van Giel, Authority to Control the School Program (1976) Ch. 3; S. Halperin and W. Wayson, "Elementary and Secondary Education Act: Decennial Views of the Revolution," 57 Phi Delta Kappan 147 (1975)

32. J. Jeffrey, op. cit. supra note 3, pp. 97-136; M. McLaughlin, "Implementation of ESEA Title I: A Program of Compliance," 77 Teachers College Record 397 (1976); J. Murphy, "Title I of the Elementary and Secondary Education Act: The Politics of Implementing Federal Education Reform," 41 Harvard Educational Review 35 (1971)

33. J. Jeffrey, op. cit. supra note 3, 136, 143-173; J. Allen, "An Interview with James Allen," 41 Harvard Educational Review (1971)

34. Breyer 573

35. Breyer 573

36. See D. Burnes, "A Case Study of Federal Involvement in Education," 33 Annals no. 2 87 (1978)

37. See the authorities collected at notes 31 and 32 supra. See also D. Porter and D. Warner, "How Effective are Grantor Controls?" in K. Boulding, M. Pfaff and A. Pfaff, eds., Tax Transfers in an Urbanized Economy (1973)

38. Murphy, op. cit. supra note 322

39. Burns, op. cit. supra note 36

40. Breyer 573

41. See "Comment" The Courts, HEW and Southern School Desegregation," 77 Yale L.J. 185 (1967); "Comment" Implementing Title IX: The HEW Regulations," 124 U. Penn. L.R. 806 (1976); "Comment: HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges," 1976 Brigham Young L.R. 133

42. Breyer 574